

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 22, 2001 Session

STATE OF TENNESSEE v. DARON MILLER

Appeal from the Circuit Court for Bradley County
No. M-99-501 Steven R. Bebb, Judge

No. E2000-01867-CCA-R3-CD
August 23, 2001

The defendant, Daron Miller, pled guilty to three counts of sexual battery by an authority figure, a Class C felony. See Tenn. Code Ann. § 39-13-527. The trial court imposed three concurrent Range I sentences of three years. In this appeal of right, the defendant contends that he was improperly denied probation. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed.

GARY R. WADE, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

James F. Logan, Jr., Cleveland, Tennessee, for the appellant, Daron Miller.

Paul G. Summers, Attorney General & Reporter; Elizabeth B. Marney, Assistant Attorney General; Jerry N. Estes, District Attorney General; and Stephen D. Crump, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The female victim, PM,¹ was born March 22, 1985. In January of 1999, she resided in Cleveland with her mother, Kim Miller, and the defendant, who is her natural father. On January 17, Ms. Miller reported to the Bradley County Sheriff's Department that the defendant had been sexually abusing the victim. Two days later, the victim informed Detective Tony Alvarez that the defendant had been sexually abusing her for the past year.

In her statement to police, the victim explained that she decided to tell her mother about the abuse because she was "just tired of [the defendant] doing this" and because the defendant had upset her following a disagreement about her boyfriend. The victim stated that the first incident of abuse occurred in January of 1998, shortly after the defendant's brother was murdered. As she was

¹It is the policy of this court not to identify minor victims of sex crimes.

sleeping in her room one night, she awoke to find the defendant on top of her kissing her face and neck. When the victim asked the defendant to get off, he pinned her to the bed and attempted to pull off her shorts. After she kicked and struggled with the defendant, he lowered her shorts to her knees, spread her legs, and digitally penetrated her. The victim told police that the last sexual incident occurred in January of 1999, when the defendant again entered her room, kissed her on the face and neck and digitally penetrated her. She contended that she resisted the defendant on each occasion, but that he forced her to submit. The victim also stated that the defendant penetrated her with his penis on one occasion in July of 1998 and on one occasion in January of 1999.

During a subsequent interview with defense counsel, the victim claimed that the defendant touched her in an inappropriate manner on three separate occasions. She denied that there was penetration. At the sentencing hearing, the victim, who was recovering from open heart surgery, testified that things in the household had changed for the better since the defendant's arrest. She stated that the defendant had "always been there" and that she could not imagine having experienced her hospitalization without his support. The victim testified that she needed the defendant to assist in her medical recovery.

The defendant admitted to police that he "inappropriately touched" the victim on several occasions. He also acknowledged having "barely" penetrated her vagina with his penis on at least two instances. Because he had "tried to block it out," the defendant was unable to provide the investigating officers with the dates he had assaulted the victim.

At the sentencing hearing, Kim Miller testified that soon after she made the report to the police, the defendant acknowledged that he had sexually abused the victim. She stated that since that time, she had joined with the victim and the defendant in "a lot of prayer," arranged more family outings, and attended church regularly. Ms. Miller testified that the victim, who was born with a defective heart, had experienced two surgical procedures. She stated that the victim suffers from atrial fluttering and has a pacemaker. Ms. Miller asked for a lenient sentence, maintaining that she needed the defendant to help her through the victim's recovery.

Brenda Miller, the defendant's mother, acknowledged that the defendant had "done wrong," but maintained that he has made "everything right with everybody." She testified that the defendant needed a second chance at life and that his family needed him.

Delois Cash, a family friend, testified that she had known the defendant since he was an infant. She described the defendant as a loving father and husband and believed that his family needed him at home.

Bob Whitmire, the defendant's pastor, testified that the defendant was very active in the church's life and that he deserved leniency. He maintained that the defendant was remorseful for his actions and that his family was dependent upon his support.

The trial court denied the defendant's request for probation for the following reason:

I do believe that the seriousness of the offense would . . . be . . . depreciated if this Court granted probation in this offense. These are obviously very nice people and very concerned people and I think, I compliment them on the way they have attempted to maintain the family relationship, especially because of [the victim's] medical condition. But I sit up here day after day after day after day, and I see these cases come before this Court, and I see defendants marched off to the penitentiary time after time after time, and I do not believe that the purposes of justice would be served on behalf of the community if I did anything but require the defendant to serve his sentence. I think that he has received the mercy of this Court and I am one of those that believe that there is certainly a higher law than that of man and I think that we will all eventually have to answer if not to man then a supreme being. . . .

In this appeal, the defendant asserts that the trial court erred by denying alternative sentencing. In particular, he claims that because he has no criminal history and there is no evidence of grievous harm to the victim, it was error for the trial court to deny probation.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401 Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Especially mitigated or standard offenders convicted of Class C, D, or E felonies are, of course, presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(b).

Among the factors applicable to probation consideration are the circumstances of the offense, the defendant's criminal record, social history and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285 (Tenn. 1978). The

nature and circumstances of the offense may often be so egregious as to preclude the grant of probation. See State v. Poe, 614 S.W.2d 403 (Tenn. Crim. App. 1981). A lack of candor may also militate against a grant of probation. State v. Bunch, 646 S.W.2d 158 (Tenn. 1983).

In Ashby, our supreme court encouraged the grant of considerable discretionary authority to our trial courts in matters such as these. 823 S.W.2d at 171; see State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986). "[E]ach case must be bottomed upon its own facts." Taylor, 744 S.W.2d at 922. "It is not the policy or purpose of this court to place trial judges in a judicial straight-jacket in this or any other area, and we are always reluctant to interfere with their traditional discretionary powers." Ashby, 823 S.W.2d at 171.

In our view, the record supports the trial court's denial of the defendant's request for total probation. "To sustain the denial of probation based solely upon the nature of the offense, the criminal act, as committed, must be 'especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree,' and the nature of the offense must outweigh all factors favoring probation." State v. Lane, 3 S.W.3d 456, 462 n.15 (Tenn. 1999) (citations omitted). Here, the record reflects that the defendant sexually abused his natural daughter on several occasions over an extended period of time; that he breached his parental obligations; and that he violated the trust of one suffering from a serious medical impairment. Because the circumstances of the offense are of such nature as to outweigh all other factors, the trial court properly denied probation. An alternative sentence would have depreciated the seriousness of the crimes.

Accordingly, the judgments of the trial court are affirmed.

GARY R. WADE, PRESIDING JUDGE